No. 14-86

In The Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), AGUDAS HARABBANIM, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The petitioner Equal Employment Opportunity Commission ("EEOC") has presented a Question that, in the view of these *amici*, states the legal issue raised by the Tenth Circuit's majority opinion too narrowly. The necessary effect of the Tenth Circuit's majority opinion is to require applicants for employment who have a religious observance or practice that would require accommodation pursuant to 42 U.S.C. § 2000e(j) to inform potential employers of that religious observance or practice during the hiring process. These *amici* submit that such compelled disclosure ***in advance*** of the employment decision invites the employer to reject an applicant who would be entitled to a religious accommodation because the applicant's religious observance creates some additional inconvenience to the employer. The applicant who is rejected for this reason does not know and cannot readily prove that the applicant's religious observance was an important, if not primary, reason for rejection.

The Tenth Circuit's construction of the statute is, therefore, contrary to Congress' objective in enacting Section 2000e(j). The history of the statute establishes that Congress intended to protect applicants who have religious convictions that might affect their presence, appearance, or other conditions of employment against discriminatory hiring decisions.

Amici submit that the Question Presented on review of the Tenth Circuit's decision is the following:

Whether an applicant for employment is barred from invoking the "reasonable accommodation" provision of 42 U.S.C. § 2000e(j) if he or she fails explicitly to disclose to the potential employer before the employer makes a hiring decision that, if hired, the applicant may request an accommodation to his or her religious observance or practice.

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BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), ET AL., IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of

[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *amicus* brief.

volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs in this Court in 29 cases since 1968, usually on behalf of major Orthodox Jewish organizations. It has also supported laws protecting the right of observant Jews -- and that of their non-Jewish co-religionists -- to the reasonable accommodation of their religious observances when they conflict with governmental regulation or with societal practices.

Agudas Harabbanim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

Agudath Israel of America ("Agudath Israel"), founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel intervenes at all levels of government -- federal, state, and local; legislative, administrative, and judicial -- to advocate and protect the interests of the Orthodox Jewish community in the United States in particular, and religious liberty in general. Agudath Israel played a very active role in lobbying for the passage of the Religious Freedom and Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

National Council of Young Israel ("NCYI") is the umbrella organization for over 200 Young Israel branch synagogues with over 25,000 families within its membership. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and Israel.

Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

The Rabbinical Council of America, with national headquarters in New York City, is a professional organization serving more than 1,000 Orthodox Rabbis in the United States of America, Canada, Israel, and around the world. Membership is comprised of duly ordained Orthodox Rabbis who serve in positions of the congregational rabbinate, Jewish education, chaplaincies, and other allied fields of Jewish communal work.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before this Court which have raised issues of importance to the Orthodox Jewish community. Among those issues, of paramount importance is the constitutional guarantee of religious freedom. Because of our community's stake in the most expansive protection of this "first freedom," the

Orthodox Union was an active member of the coalition that advocated for the enactment of RFRA.

SUMMARY OF ARGUMENT

1. Section 2000e(j) was enacted to prevent the rejection of Sabbath-observers who seek employment and may require accommodations for their religious observance. Soon after the law was enacted in 1972, this Court narrowed its application because of constitutional concerns that, in light of recent decisions of this Court, are no longer applicable.

2. The decision of the Tenth Circuit will have the effect of encouraging unjustified rejections of religious believers at the hiring stage. By requiring applicants for employment to disclose that they may need accommodations, the Tenth Circuit's rule enables employers to avoid the inconvenience of such accommodations by denying employment to an applicant without explicitly acknowledging that the applicant's religion is a principal reason for rejection.

ARGUMENT

I.

A PRIMARY PURPOSE OF SECTION 2000e(j) WAS TO PREVENT DISCRIMINATION AGAINST SABBATH-OBSERVING APPLICANTS FOR EMPLOYMENT

A. The Meaning of the "Religion" Provision of Title VII of the 1964 Civil Rights Act Was Uncertain.

Title VII of the Civil Rights Act of 1964 included a prohibition in 42 U.S.C. 2000e-2(a)(1) and (2) against employment discrimination "because of religion."

Orthodox Jews, who are not permitted to work from sundown Friday to nightfall on Saturday and on a number of Jewish holidays, optimistically believed that the language of the 1964 Act prohibited employers subject to Title VII from refusing to hire them because of their Sabbath observance if a reasonable accommodation was possible. Before the 1964 Civil Rights law was enacted, employment discrimination against Sabbath-observing Jews, including rejection of their applications for employment, was common.

When attempts were made to invoke the 1964 Act's general prohibition against discrimination "because of religion" to situations in which employees needed accommodations in the hours of employment to meet *bona fide* religious observances, some employers maintained that the statutory term "religion" did not extend to religiously mandated conduct, but was limited to religious belief and ethnic identity. They refused to make any accommodation in their work schedules for Sabbath-observers.

In a regulation that became effective on June 15, 1966, the EEOC initially accepted this narrow reading of the 1964 Act and held that "a job applicant or employee who accepted the job knowing or having reason to believe that [normal work week and foreseeable overtime] requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs." 31 Fed. Reg. 8370 (June 15, 1966) (codified at 29 C.F.R. 1605.1(b)(3), 1966).

In 1967, the EEOC reconsidered and amended its regulations to provide: "The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." 32 Fed. Reg. 10298 (July 13, 1967) (codified at 29 C.F.R. 1605.1(b)).

B. Sabbath-Observing Applicants for Employment Continued To Be Rejected.

Notwithstanding the amended EEOC regulation Orthodox Jews continued to be rejected after employers learned of their unavailability on Friday afternoons in the winter (when sundown was as early as 4 pm on the Eastern coast of the United States) and on Jewish holidays. The experience of undersigned counsel to this *amicus* brief was typical of the situation that confronted many Orthodox Jews seeking employment. (The following paragraphs are recounted in the first person by Nathan Lewin).

Representation of Nathan Lewin: Between 1957 and 1960 I attended the Harvard Law School, where my grades placed me in the top 2% of my class and earned me a position on the *Harvard Law Review*. When I was seeking employment with law firms in

New York City in 1958 and 1959, I did not, in interviews or in the application process, initiate discussion of religious convictions that prevented me, as a Sabbath-observing Orthodox Jew, from working on late Friday afternoons in the winter, Saturdays, and certain Jewish holidays. Since my resume indicated that I had attended a religiously-affiliated Jewish college (Yeshiva College), I was often asked whether I was a Sabbath-observer. I replied that I was, but that I would attempt to complete work needed by the law firm early on Fridays and in advance of Jewish holidays.

I was the only *Harvard Law Review* member of my law-school class to receive no offer of employment from any of New York City's leading law firms. Firms had no obligation to state a reason for rejecting me, and none did. It was plain to me, however, that although many law firms had made no explicit reference to my religious observance (two suggested during interviews that if I wanted to succeed as a lawyer I should obtain a "rabbinical dispensation" to work on Saturdays and Jewish holidays) they had decided that regardless of academic performance and other qualifications, accommodation to my religious observance was too bothersome to warrant giving me an offer of employment.

Fortunately, the federal judges whom I served as a law clerk – Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit and Associate Justice John M. Harlan of the Supreme Court – made accommodations for my religious observances. See 27 Journal of Supreme Court History 154 (2002). During my subsequent

employment with the Departments of Justice and State in the 1960's, administrative personnel at these executive agencies also made it possible for me to continue observance of Orthodox Judaism by accommodating my work schedule without imposing any penalty for my absence on account of my religious observance.

When I began private practice in 1969, I was consulted by Orthodox Jewish applicants for employment in various occupations (including law-school graduates applying to law firms) who had been rejected after they notified prospective employers that they would need adjustments in work schedules in order to observe the Sabbath and Jewish holidays. Together with other volunteers of the National Jewish Commission on Law and Public Affairs ("COLPA"), I then sought regulations that would protect their religious observance.

C. <u>This Court Did Not Resolve the Central Disputed Issue</u>.

The meaning of the term "religion" in the 1964 Act became the subject of active litigation. The issue was whether the statutory term "religion" included religious observance and practice and whether employers had to make reasonable accommodations for employees' observances.

Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), arose before the 1967 EEOC regulations took effect. It was a case in which an employee who observed Sunday as a day of rest was fired for refusing to perform overtime work on Sundays. The District Court ruled, after a non-jury trial, that the discharge violated Title VII. *Dewey v. Reynolds*

Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969). The court of appeals reversed, finding, *inter alia*, that no reasonable accommodation was required under the language of the 1964 Act. 429 F.2d 324 (6th Cir. 1970).

A petition for certiorari was filed in *Dewey v. Reynolds Metals Co.*, and it was granted. 400 U.S. 1008 (1971). Briefs were filed and argument was heard on April 20-21, 1971. On June 1, 1971, this Court issued an order affirming the Sixth Circuit by an equally divided Court. *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971) (Justice Harlan did not participate).[2]

D. Orthodox Jewish Organizations Proposed and Lobbied For the Current Language of Section 2000e(j).

Because of this Court's equal division Orthodox Jews seeking employment continued to suffer discrimination in hiring. Undersigned counsel, with the assistance of many members of the National Jewish Commission on Law and Public Affairs ("COLPA") and its director Dennis Rapps, initiated a

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[2] Even after the enactment of Section 2000e(j), the issue continued to divide this Court. The Sixth Circuit's decision in *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), that sustained the EEOC's reasonable-accommodation requirement, was first affirmed by an equally divided Court (429 U.S. 65 (1976)) (Justice Stevens did not participate), and was subsequently vacated and remanded in light of *TWA v. Hardison*, 432 U.S. 63 (1977). *Parker Seal Co. v. Cummins*, 433 U.S. 903 (1977).

lobbying effort to amend the 1964 Act to incorporate the substance of the 1967 EEOC regulations.[3]

Language amending other provisions of Title VII had already been approved by a subcommittee of the Senate Labor and Public Welfare Committee, so Senator Harrison Williams, the Committee's chairman, and Senator Jacob Javits, its ranking minority member, recommended that any proposed amendment protecting the rights of Sabbath-observers be proposed on the floor of the Senate by Senator Jennings Randolph of West Virginia. Senator Randolph was a Seventh-Day Baptist (observing Saturday as a Sabbath day of rest) and was a highly respected chairman of the Senate Public Works Committee. Senator Randolph took the unusual step of introducing the amendment protecting religious observance on the floor of the United States Senate when the Senate was voting on other revisions to Title VII of the 1964 Civil Rights Act. 118 *Cong. Rec.* 705 (January 21, 1972).

In support of his amendment, Senator Randolph said, "I am a member of a denomination which is a relatively small one, the Seventh-Day Baptists." *Id.* He cited "religious bodies" that have "certain strong convictions that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the

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[3]A detailed contemporaneous narrative of the full lobbying effort appears in Nathan Lewin, "A Battle Won on Purim," The Jewish Press, Vol. 23, No. 14, April 7, 1972, pp. 4, 18, 20-22, 26; see also Brief *Amicus Curiae* for the National Jewish Commission on Law and Public Affairs, *Parker Seal Co. v. Cummins*, No. 75-478, pp. 17-19.

Sabbath, be other than on Sunday." *Id.* The Senator referred explicitly to "approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons" and "an additional 425,000 men and women in the work force who are Seventh-day Adventists." *Id.*

Senator Randolph continued his address on the Senate floor by noting "that there has been a partial refusal at times on the part of employers ***to hire*** or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days." *Id.* (emphasis added). He also noted that this Court had "divided evenly" on the definition of religion. *Id.*

Following supporting statements by Senators Williams and Dominick, a vote was taken. The Randolph Amendment (now 42 U.S.C. 2000e(j)) was passed by a 55-to-nothing vote of the Senate, with 13 absent Senators noting that they would have voted "yes." 118 *Cong. Rec.* 731 (January 21, 1972).
The House Conference Committee met on February 28 and 29, 1972, and it approved the language passed by the Senate. 118 *Cong. Rec.* 6643, 6646 (March 2. 1972). The complete bill was passed by a House vote of 303-110. 118 *Cong. Rec.* 7572-7573 (March 8, 1972).

E. Section 2000e(j) Was Given Limited Effect by This Court at a Time When Burdening Others To Protect Religious Exercise Was Disfavored.

Notwithstanding the broad language of Section 2000e(j), it was given a miserly construction by a majority of this Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-85 (1977). Justices

Brennan and Marshall, dissenting in *TWA v. Hardison*, described that decision as dealing "a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." 432 U.S. at 86. The dissenting opinion concludes: "The ultimate tragedy is that despite Congress' best efforts, one of this Nation's pillars of strength our hospitality to religious diversity has been seriously eroded. All Americans will be a little poorer until today's decision is erased." 432 U.S. at 97.

Lower courts have occasionally read this Court's majority opinion in *TWA v. Hardison* narrowly and have required accommodations for religious observance even when neutral seniority systems have stood in the way. *E.g.*, *Antoine v. First Student, Inc.*, 713 F.3d 824 (5th Cir. 2013); *Cosme v. Henderson*, 287 F.3d 152 (2d Cir. 2002). Although the question need not be reached in this case, it is time for this Court to recognize that *TWA v. Hardison* was decided in 1975 – a time in this Court's history when the Establishment Clause was viewed by a Court majority as a barrier to government assistance of any kind to religious observance and education.

Times have changed. This Court's 1985 decision in *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), which was the peak of Establishment Clause restriction on aid to religion, was explicitly overruled in 1997 by *Agostini v. Felton*, 521 U.S. 203 (1997). In 2002 the Court decided *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which further diminished the impact of the Establishment Clause on religious education in the United States.

More recent decisions of this Court on the subject of religious observance and expression manifest a view that conflicts with the approach of the majority in *TWA v. Hardison*. See, *e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Cutter v. Wilkinson*, 544 U.S. 709 (2005). Although the Court may easily decide this case without overruling *TWA v. Hardison*, we urge the Court to implement the suggestion in the dissent of Justices Brennan and Marshall and "erase" that decision.

II.

REQUIRING AN APPLICANT FOR EMPLOYMENT TO DISCLOSE THAT HE OR SHE NEEDS A RELIGIOUS ACCOMMODATION WILL ENCOURAGE RELIGIOUS DISCRIMINATION THAT A REJECTED APPLICANT WILL BE UNABLE TO PROVE

The court below did not, we submit, appreciate the practical effect that its advance disclosure requirement would have on applicants for employment, and particularly on the Sabbath-observers who are the distinctive religious minority that the 1972 amendment was designed to protect. The majority opinion noted that under the EEOC's guidelines an employer is "***affirmatively discouraged***" from inquiring about a job applicant's religious beliefs because "religious affiliations or beliefs are generally viewed as non job-related and problematic under federal law." Pet. App. 53a-54a; emphasis original). But it failed to consider

what result is likely to follow – and, as we have demonstrated, what the history of job discrimination against Sabbath-observers actually demonstrated – if employers can demand that applicants notify them of potential religious conflicts with general working-conditions rules before the hiring decision is made.

An employer who is given a choice between hiring (a) an applicant who has no religious observance that would disrupt routine work-schedules and (b) an applicant whose beliefs will necessitate an accommodation will ordinarily choose the applicant who will create the least disruption. Section 2000e(j) was designed to eliminate religious observance that can be accommodated without undue hardship as a permissible factor in an employer's hiring decision. Nonetheless, as the facts of the case now before the Court tellingly demonstrate, an employer cannot be expected to ignore potential employment difficulties in making the hiring choice.

If the decision of the Tenth Circuit in this case is sustained, Sabbath-observing applicants for employment may feel compelled to disclose during a hiring interview or at some other time during the hiring process that they will need a religious accommodation under Section 2000e(j). The probable result will be that the applicant making such a disclosure will be rejected without ever being told that his religious observance affected the hiring decision. Rarely will an employee involved in the hiring decision disclose the effect that the applicant's religious observance had on the decision to reject him or her.

Since the enactment of Section 2000e(j) attorneys concerned with religious discrimination against Orthodox Jews have advised Sabbath-observing applicants for employment that they may accept jobs without disclosing in advance of the hiring decision that they will require an adjustment of their work-schedules. For the same reason, applicants who wear skullcaps ("yarmulkes") as a matter of religious observance have been advised that they should not wear religious headgear when they appear for hiring interviews. These and similar observances may be withheld until ***after*** the applicant is hired. A request for accommodation may first be made at that time.

It is, we submit, entirely fair and appropriate to expect employers to choose among applicants those who possess the best qualifications – without considering the effect of each applicant's religious observance. After an applicant has been hired, he or she should work cooperatively with the employer to devise a reasonable accommodation for a work-schedule or for religious dress while on the job.

The "notice requirement" that the court below imposed, as a matter of statutory construction, on ***all*** those who have rights protected by Title VII may, to be sure, apply when an employee who is already employed seeks a particular accommodation for religious reasons. An employer cannot be required to guess whether an employee seeks to have two days off to observe Passover or to visit the Grand Canyon. Consequently, we do not challenge the application of a "notice requirement" in cases like *Cary v. Carmichael*, 908 F. Supp. 1334 (E.D. Va. 1995), *aff'd sub nom. Cary v. Anheuser-Busch, Inc.*, 116 F.3d 472 (4th Cir. 1997), *Johnson v. Angelica Uniform Group,*

Inc., 762 F.2d 671, 673 (8th Cir. 1985), and *EEOC v. J.P. Stevens and Company, Inc.*, 740 F. Supp. 1135, 1137 (M.D.N.C. 1990), in which employers were not told by employees that religious convictions motivated their failure to follow rules applicable to other employees.

In this case, however, Ms. Elauf was denied employment because she did not explicitly state, **before she was hired**, that she would need a religious accommodation. Requiring her to notify her potential employer that she would have to be treated differently from its other employees is an invitation to the employer to reject her job application without disclosing the reason for the rejection.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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